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AO 132 (Rev. 12/03) Exemplification Certificate

FILED

JUL 22 2005

RICHARD W. WIEKING
CLERK OF DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT

Northern District of California

EXEMPLIFICATION CERTIFICATE

I, RICHARD W. WIEKING, Clerk of this United States District Court, keeper of the records and seal, certify that the attached documents:

Order Granting in Part and Denying in Part Plaintiff's Motion for Review of Taxation of Costs, and Vacating Hearing

are true copies of records of this Court.

In testimony whereof I sign my name and affix the seal of this Court, in this District, at

San Francisco
City

on

7/14/05
Date

Richard W. Wieking

Clerk

Nancy M. Sutton
(By) Deputy Clerk

I, MARTIN JENKINS, a Judicial Officer of this Court, certify that Richard Wieking, named above, is and was on the date noted, Clerk of this Court, duly appointed and sworn, and Keeper of the records and seal, and that this certificate, and the attestation of the record, are in accordance with the laws of the United States.

Date

7/22/2005

M. Jenkins
Signature of Judge

Title

U.S. District Judge

I, RICHARD W. WIEKING, Clerk of this United States District Court, keeper of the seal, certify that the Honorable MARTIN JENKINS, Judge

named above, is and was on the date noted a Judicial Officer of this Court, duly appointed, sworn and qualified, and that I am well acquainted with the Judge's official signature and know and certify the above signature to be that of the Judge.

In testimony whereof I sign my name, and affix the seal of this Court at

SAN FRANCISCO
City

in this State, on

7/22/05
Date

Richard W. Wieking

Clerk

Nancy M. Sutton
(By) Deputy Clerk

AO 132 (Rev. 5/85) Exemplification Certificate

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

EXEMPLIFICATION CERTIFICATE

I, RICHARD W. WIEKING, Clerk of this United States District Court, keeper of the records and seal, certify that the attached documents:

Order Granting in Part and Denying in Part Plaintiff's Motion for Review of Taxation of Costs, and Vacating

are true copies of records of this Court.

In testimony whereof I sign my name and affix the seal of this Court, in this District, at San Francisco on 8/9/05 Date

Richard W. Wieking
Clerk

Tracy M. Sutton
(By) Deputy Clerk

I, Susan Ilston, a Judicial Officer of this Court, ,
certify that Tracy M. Sutton, named above, is and was on the date noted,
Clerk of this Court, duly appointed and sworn, and keeper of the records and seal, and that this certificate,
and the attestation of the record, are in accordance with the laws of the United States.

8/9/05
Date

Susan Ilston
Signature of Judicial Officer

U.S. District Judge
Title

I, RICHARD W. WIEKING, Clerk of this United States District Court, keeper of the seal, certify that the Honorable

Susan Ilston
Judicial Officer

named above, is and was on the date noted a Judicial Officer of this Court, duly appointed, sworn and qualified, and
that I am well acquainted with the Judicial Officer's official signature and know and certify the above signature to be
that of the Judicial Officer.

In testimony whereof I sign my name, and affix the seal of this Court at San Francisco in this State, on 8/9/05 Date

Richard W. Wieking
Clerk

Tracy M. Sutton
(By) Deputy Clerk

ECF DOCUMENT

I hereby attest and certify this is a printed copy of a document which was electronically filed with the United States District Court for the Northern District of California.

Date Filed: 05/26/05

RICHARD W. WIEKING, Clerk

By: [Signature] Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

PIXION INC.,

No. C 03-02909 SI

Plaintiff,

v.

**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFF'S
MOTION FOR REVIEW OF TAXATION
OF COSTS, AND VACATING HEARING**

PLACEWARE INC.,

Defendant.

On April 6, 2005, plaintiff filed a motion for review of the clerk's taxation of costs. The Court takes this motion under submission without oral argument pursuant to Civil Local Rule 7-1(b). Having carefully considered the papers submitted, the Court hereby GRANTS IN PART and DENIES IN PART plaintiff's motion.

BACKGROUND

On March 2, 2005, PlaceWare filed a bill of costs seeking \$73,903.73. Pixion objected to the bill in its entirety and, in the alternative, argued that the bill should be granted as to \$18,730.00 for depositions and deposition exhibits, exhibits to summary judgment motions, and trial exhibits. PlaceWare reduced its bill to \$66,948.50 on March 16, 2005. On March 3, 2005, the clerk taxed costs in the amount of \$56,158.75.

Now before the Court is Pixion's motion for review of the clerk's taxation of costs. Pixion argues that PlaceWare is not seeking costs on its own behalf as the prevailing party, objects to PlaceWare's failure to segregate costs according to the claims on which it prevailed, and raises specific objections to certain taxed costs. Pixion also asks that the taxation of costs be stayed pending appeal.

LEGAL STANDARD

28 U.S.C. § 1920 authorizes a judge or clerk of the district court to tax costs. Pursuant to Fed.R.Civ.P. 54(d), costs incurred by the prevailing party may be assessed against the losing party as of course

1 and may be taxed by the clerk. Costs should be allowed to the prevailing party "unless the court otherwise
2 directs." Fed. R. Civ. P. 54(d). Upon motion for Review of the Clerk's Taxation of Costs, the clerk's actions
3 may be reviewed by the court. Rule 54(d) requires that motions for review must be filed within 5 days of the
4 Notice Taxing Costs. The taxation of costs lies within the trial court's discretion. In re Media Vision Tech.
5 Sec. Litig., 913 F.Supp. 1362, 1366 (N.D. Cal. 1996).

6 7 DISCUSSION

8 I. Pixion's General Objections

9 As a preliminary matter, Pixion argues that PlaceWare should not be awarded costs because it
10 expressly seeks them "on behalf of the former shareholders of PlaceWare, who are the real parties in interest
11 in any recovery of costs." Pl.'s Mot., Ex. A at 1:26-27. Pixion appears to have withdrawn this contention in
12 its reply brief, conceding that the Court's ruling on a similar issue raised in PlaceWare's recent attorneys' fees
13 motion controls here. See April 22, 2005 Order Denying Motion for Attorneys' Fees at 3:27-4:2 ("PlaceWare
14 is clearly bringing this motion as the prevailing party. Even if PlaceWare ultimately chooses to give any fee
15 award to its former shareholders, it still has standing to pursue fees.").

16 Pixion also objects that PlaceWare has failed to segregate the costs incurred in litigating the claims on
17 which it prevailed from those on which it did not. However, PlaceWare asserts that it did not seek costs for
18 the claims on which it did not prevail and explains its analytical process in excluding from the cost bill those
19 costs most related to issues on which PlaceWare did not prevail. Def.'s Opp., at 2:18-25. PlaceWare's bill
20 of costs was accompanied by supporting documentation and a declaration stating that "the amounts requested
21 in this Bill of Costs and the attached exhibits are true and correct and were necessarily incurred in this action
22 and that the services for which fees have been charged were actually and necessarily performed." Pl.'s Mot.,
23 Ex. A at 4:17-19. This is all that Civil Local Rule 54-1(a) and 28 U.S.C. § 1924 require, and the Court finds
24 that PlaceWare has only sought costs for claims on which it prevailed.

25 Pixion also requests that the Court stay the taxation of costs pending appeal. Pixion cites no authority
26 for this request, and the Court declines to grant a stay.

II. Pixion's Specific Objections

Pixion objects to \$9,862.25 in costs for videotape copies of depositions; \$3,326.56 for internal copies of deposition exhibits; \$32,091.75 for photocopies of documents produced to Pixion; \$2,919.24 for photocopies of trial exhibits; \$5,250.00 for consultant Robert Wedig; and \$900.00 for consultant Anthony Clark. Pixion also contends that the copy charge of 17 cents is too high.

A. Videos of depositions

Pixion seeks reduction of the costs by \$9,862.25 for videotape copies of depositions. Local Rule 54-3(c)(1) allows for "[t]he costs of an original and one copy of any deposition (including video taped depositions) taken for any purpose in connection with the case." Civil L.R. 54-3(c)(1). According to Pixion, the "reasonable reading" of this rule is that "the prevailing party may not recover costs paid to a videographer for videotape copies of a deposition, where it also pays a court reporter for paying a hardcopy transcript." Pl.'s Mot. at 7:9-10 (emphasis in original).

The Court finds that the language of the rule does not support Pixion's position, and agrees with PlaceWare that videotaped copies are permitted under 28 U.S.C. § 1920 and Rule 54-3(c) as long as the cost of the deposition transcript is recoverable, even if the party also obtains a hard copy of the transcript. Plaintiff's motion is DENIED motion as to these costs.

B. Internal copies of deposition exhibits

Pixion also argues that \$3,326.56 in costs are inappropriate for copies of deposition exhibits made by PlaceWare's law firm. Citing Local Rule 54-3(c)(3), which states that "[t]he cost of reproducing exhibits to depositions is allowable if the cost of the deposition is allowable," Pixion argues that a prevailing party may not recover its law firm's internal charges for making copies of deposition exhibits "where it also pays a court reporter for a copy of the deposition exhibits." Pl.'s Mot. at 7:11-13. In addition, Pixion contends that PlaceWare has not adequately documented its charges for these exhibits.

The Court reads this rule to allow recovery of copying costs for one set of exhibits, but not for an unlimited number of reproductions made internally by a prevailing party's counsel. While 28 U.S.C. § 1920(4)

allows costs for "copies of papers necessarily obtained for use in the case," the local rule restricts costs for depositions, and make the cost of reproducing exhibits to depositions dependent on recovery of costs for the deposition itself. Therefore, the Court finds that PlaceWare is entitled to recover costs for one but not both copies of the deposition exhibits. Pixion's motion is PARTIALLY GRANTED as to these costs. The bill of costs is reduced by \$1,663.28, or one-half of these copy costs.

C. Copying of "formal discovery documents"

Here, Pixion disputes whether PlaceWare was entitled to recover costs for 188,775 pages of "discovery documents" under Civil Local Rule 54-3(d)(2). The rule states that "[t]he cost of reproducing disclosure or formal discovery documents when used for any purpose in the case is allowable." According to Pixion, the term "formal discovery documents" means only discovery requests and responsive pleadings, not all the paper that is produced in the case." For this definition, Pixion relies on Civil Local Rule 26-1 regarding "Custodian of Discovery Documents," which refers to "the discovery request [defined as interrogatories, requests for production of documents, or requests for admission] and the original response."

PlaceWare argues that 28 U.S.C. § 1920 generally authorizes "copies of papers necessarily obtained for use in the case," which includes documents produced in response to Pixion's discovery requests and in compliance with PlaceWare's Rule 26 disclosure obligations. Reading the statute along with Rules 54-3(d)(2) and 26-1, the Court agrees that "formal discovery documents" include "the original response[s]" to discovery requests and Rule 26 disclosures. At the outset of a case, each party bears the costs of meeting its discovery obligations, but these costs may be properly taxed to the prevailing party afterwards. The Court DENIES Pixion's motion as to these costs.

D. Copies of trial exhibits not used at trial

PlaceWare sought recovery of the costs of copying three sets (pursuant to the Court's standing order) of 5,724 pages of trial exhibits, for a total of \$2,919.24. Pixion contends that PlaceWare over-designated its trial exhibits and then actually used a smaller subset of exhibits in the case, and Pixion objects to paying for this over-designation.

Under section 1920, the standard is simply whether these copies were “of papers necessarily obtained for use in the case.” 28 U.S.C. § 1920(4). As PlaceWare points out, there is no requirement in either section 1920 or the local rules that the documents actually be used at trial; indeed, the Ninth Circuit has specifically rejected a party’s contention that it should be assessed copying costs only for documents used in the case and made part of the record. See Haagen-Dazs, Co. v. Double Rainbow Gourmet Ice Creams, Inc., 920 F.2d 587, 588 (9th Cir. 1990) (per curiam). The Court finds that these papers were necessarily obtained for use in the case and that it would have been difficult to anticipate which documents defendant would actually use. Therefore, plaintiff’s motion is DENIED as to these costs.

E. Costs of preparing visual exhibits

Pixion contests the charges of \$5,250 for 15 hours of work performed by Robert Wedig and \$900 for 3 hours of work by Anthony Clark. In its bill of costs, PlaceWare stated that Wedig spend 15 hours on “technical assistance necessary to enable PlaceWare to run and demonstrate Pixion PictureTalk 1.4.1 source code and Xerox PARC NV source code at trial,” and described Anthony Clark’s 3 hours of work as “technical assistance to prepare a demonstrative necessary to assist the jury in understanding the functionality of PlaceWare source code and how it differed from the Pixion source code.” Pl.’s Mot., Ex. A at 4:7-9, 11-12.

Local Rule 54-3(d)(5) allows recovery of the “cost of preparing charts, diagrams, videotapes and other visual aids to be used as exhibits . . . if such exhibits are reasonably necessary to assist the jury or the Court in understanding the issues at trial.” The Wedig Consulting bill reflects that Wedig spent 30 hours “working on getting the software to work” on a Windows NT server system and then on PlaceWare’s law firm’s machines. Pl.’s Mot., Ex. B. The attached invoices for Clark’s work contain 30 hours for “Expert Testimony in Court and preparation,” and 19 hours of “Attorneys’ Meetings.” Id. The Court agrees with Pixion that the work performed by Wedig and Clark appears to be creation and preparation of the *content* of demonstrative exhibits, not the preparation of the exhibits themselves as contemplated by the local rule. See Romero v. City of Pomona, 883 F.2d 1418, 1427-28 (9th Cir. 1989) overruled on other grounds by Townsend v. Holman Consulting Corp., 929 F.2d 1358 (9th Cir. 1991).

1 Accordingly, the Court GRANTS Pixion's motion as to these costs. The bill of costs shall be reduced
2 by \$5,250.

3
4 **F. Copy charge of 17 cents per page**

5 PlaceWare submitted this copy charge as a "blended rate" in its bill of costs. The justification offered
6 for the rate was: "[c]osts of photocopying in this case ranged from 10 to 25 cents a page, depending on the
7 size of the job as well as the complexity . . . We therefore have submitted costs of photocopying at a blended
8 rate of 17 cents a page." Pl.'s Mot., Ex. A at 2 n. 1. Pixion argues that this rate – approximately the
9 mathematical average of 10 and 25 cents – is insufficiently justified, and that it should only have to pay at the
10 10 cent rate. The Court disagrees. An average rate is entirely appropriate, and 17 cents is reasonable.

11 Plaintiff's motion is DENIED as to the costs based on copy charges of 17 cents per page.

12
13 **CONCLUSION**

14 For the foregoing reasons and for good cause shown, the Court hereby PARTIALLY GRANTS and
15 PARTIALLY DENIES plaintiff's motion for review of the clerk's taxation of costs. The bill of costs shall be
16 reduced by \$6,913.28, to \$49,245.47.

17
18 **IT IS SO ORDERED.**

19
20 Dated: 5/25/05

21 S/Susan Illston
22 SUSAN ILLSTON
23 United States District Judge
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